

P R O C E E D I N G S

May 2, 1997 2:05 p.m.

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(The following proceedings were reported by
Terrie Cook.)

MR. CRIST: We know that Jean Connor
had a belief in 1961 that cigarette smoking caused
or -- causes lung cancer. She smoked anyway.
We know that she was exposed to this
information necessarily through her school and otherwise.
She smoked anyway. We know that she smoked
for 27 years after the warnings were put on the
packages. We know that those warnings were
as constant reminders to her. We know that she
also received the message of those warnings. We
know that she was exposed to these warnings or
potentially exposed to these warnings an
astronomical number of times.
You've heard evidence that Jean Connor
smoked between two and three packs per day,
every day. This equals 40 cigarettes a day,
equals 60 cigarettes a day, 365 days a year and
a total of 27 years or thereabouts. That totals
the 394,000 potential exposures to the
warning merely on the packs at two packs a day, and at
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591,000 warnings at three packs a day.
Now, there's one other point that I want to
make here and then I'm going to move on with
respect to these warnings. And that is that we
know that Jean Connor switched to Benson and
Hedges in 1978 or perhaps 1983. And you
heard evidence in this case that if you stopped
smoking that your risk of lung cancer, your
statistically referred risk of lung cancer drops
significantly. There's some debate about
whether it returns to baseline, but it drops
significantly. And it drops significantly
certainly within 10 to 15 years. 10 years from
her diagnosis in 1993 puts her 1983; 15 years
would have been 1978.
The attribution -- well, by virtue of the
fact that had she quit smoking -- smoking in
1978 or 1983 --
MR. WILNER: Excuse me, Your Honor,
that's speculation. We talked about that earlier, that
that's not a proper argument in this case. We
discussed that earlier.
MR. CRIST: Your Honor, it goes directly
to proximate cause.
THE COURT: The jury will base its verdict
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1 on the evidence as the court -- as you have
2 received it rather than on any argument or
3 proposition of argument submitted by -- by
4 counsel, therefore, be guided in that in coming
5 to your conclusions.

6 MR. CRIST: Thank you, Your Honor.

7 Now, I want to come back and talk a little
8 bit about personal -- the last two issues on
9 here, personal choice and people who quit.

10 Each one of us has to make lifestyle
11 choices, choices about drinking alcohol, choices
12 about getting enough exercise or being a couch
13 potato, choices about the foods we eat and how
14 much of the foods we eat and choices about

what

15 not to smoke. Ms. Connor made all those
16 decisions. And for purposes of this case,
17 perhaps most importantly, she chose to smoke

and

18 she chose to continue to smoke.

19 The issue is not and cannot be whether or
20 not we agree with her choices, but they were

her

21 choices. We may not all make the same lifestyle
22 choices, but we do have to make choices.

23 Among her choices were the brands that she
24 chose, Winston-Salems, she tried and rejected
25 Salem wise and then she switched to Benson

and

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1 Hedges, as we talked about. She chose not to
2 smoke a whole variety of other brands that were
3 out there. But we don't and it should not be
4 decided in this case whether or not she made

the

5 right choices because that's not what's at
6 issue. We don't need to reweigh the decisions
7 that she made, nor should we be able to say that
8 she made the wrong decisions and, therefore,
9 she's entitled to money damages.

10 This issue is tied in very directly with
11 the smoking behavior issue. In opening
12 statement, I told you that when the day was

done

13 and when you went into deliberations that you
14 would conclude that smoking behavior is what
15 smoking behavior is. I told you that I didn't
16 think the labels made a lot of difference
17 whether you called it addiction, a dependence

or

18 habituation, because smoking behavior is what
19 smoking behavior is.

20 I told you that there had been many
21 definitions that had been given to the terms of
22 addiction, that they're used in the lay sense
23 and have been for decades in many different

ways

24 by many different people, that there had been
25 strict definition applied by the role of the

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1 World Health Organization in the late 1950s
2 adopted by the Surgeon General's advisory
3 committee in 1964 that the World Health
4 Organization then had abandoned that sharp
5 distinction between habituation and addiction

at

6 the end of 1964, but went to the term
7 dependence, abandoned addiction and

habituation

8 altogether.

9 And that, we thought, 1988 the term
10 addiction was resurrected, almost entirely new
11 definition. That's what the evidence in this
12 case showed, precisely what happened.

13 With respect to that term, we also looked
14 at Jean Connor's definition of addiction. And
15 you'll remember from the testimony what her
16 definition was.

17 "Did that definition apply to your feelings
18 for anything else?

19 "Yeah, I had to have Diet Pepsi when I wake
20 up in the mornings.

21 "Question: Okay. You're addicted to Diet
22 Pepsi, are you not?

23 "Answer: That, or the caffeine in it."

24 The evidence in this case and, in fact, to
25 that matter, your common sense will tell you

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1 that cigarette smoking is not intoxicating.

2 People don't get drunk because they smoke.

3 People don't OD on cigarettes. They don't have

4 an ever-increasing requirement for the number

of

5 cigarettes that they smoke every day. That's a
6 concept of tolerance, one of the two concepts of
7 tolerance we've talked about.

8 When they stop smoking, they don't have
9 DT's, they don't have life-threatening
10 withdrawal, a certain number of them don't die
11 because they're going through withdrawal. For
12 those who have difficulty, for those
13 experiencing any withdrawal symptoms at all,
14 they're very mild. They can be irritable, lose
15 concentration and so forth, but they're mild and
16 they're transient. Smokers don't mug little old
17 ladies, they don't try to sell their children,
18 they don't prostitute themselves to get money to
19 be able to buy themselves cigarettes.

20 The so-called compulsion that was described
21 to you here is not a compulsion which drives
22 people to seek the drug to such an extent that
23 it destroys their families, that it destroys
24 their ability to perform their job. Indeed, the
25 evidence is much to the contrary, that smoking

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1 can, in fact, facilitate performance.

2 I want to point out just real quickly a
3 chart which Dr. Ciraulo showed you that talks
4 about some of the other, at least in the lay
5 sense, common addictions. Some of you will
6 remember the song, recently popular, Addicted

to

7 Love. Some of you remember Dr. Ciraulo's
8 testimony that Surgeon General Coop described
9 video games as addictive, in 1988, the same year
10 cigarettes became addictive under the new
11 definition.

12 Now, I walked through those criteria, those
13 common-sense criteria that distinguish

cigarette

14 smoking from truly addictive substances. That
15 definition of common-sense criteria that I
16 outlined for you really very much tracked the
17 1964 definition of the Surgeon General, was in
18 the Surgeon General's advisory committee
19 report. But in addition to that, I also wanted
20 to point this out, that in opening statement I
21 told you that some smokers do have difficulty
22 quitting, at least at certain points in their
23 time. I told you the great majority of people
24 who decide to stop smoking were able to do so
25 quite easily with relatively little discomfort,
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1 that those who continued to smoke did so for
2 important psychological reasons, not

necessarily

3 a physical cause and that even for those who
4 experienced difficulty, smoking remained very
5 much a matter of personal choice.

6 Plaintiffs' responded with Dr. Feingold.
7 Dr. Feingold told you about his experience in
8 Canada with narcotic addicts. He told you

three

9 or four or five or six times about his DEA
10 license. He told you about how he helped select
11 literature for the South Miami Hospital

Smoking

12 Cessation Clinic. He told you how about he for
13 many years has given the introductory and
14 fundamental lectures on nicotine addiction at
15 that clinic. He told you about a supposedly new
16 nicotine agonist/antagonist therapy. He told
17 you about the thousands of hours that he had
18 devoted over the past 15 to 20 years to studying
19 nicotine addiction. He told you that the great
20 majority of people didn't find it easy to quit.
21 He told you how smoking didn't remain a

matter

22 of personal choice. He told you how it was not
23 true that quitting smoking was much like

losing

24 weight. He told you how it was not true that
25 cigarette smokers plateau and stayed basically
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1 at the same level.

2 And then this is what he told you on cross
3 examination (The videotape was played as
4 follows:)

5 "MR. CRIST: Your Honor, may I approach

the

6 witness?

7 THE COURT: Yes, you may.

8 Q Let me show you Dr. Feingold a copy of a
9 transcript of a deposition of May 13, 1992, of I.A.
10 Feingold, M.D. That's you?

11 A Yes.

12 Q Turn with me to page 4.

13 MR. WILNER: Your Honor, excuse me. I
14 don't think it's proper impeachment unless he
15 asks a question first. Just to read from a
16 deposition, I don't think, is impeaching
17 anyone.

18 MR. CRIST: Your Honor --

19 THE COURT: I don't know yet what it's
20 about.

21 MR. CRIST: He said he had no
22 recollection. I'm just trying to refresh his
23 recollection.

24 THE COURT: Okay.

25 BY MR. CRIST:

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1 Q Page 6, personal information, do you see
2 that?

3 A Yes.

4 Q Describes you pretty well, doesn't it?

5 A It does.

6 Q Okay.

7 A It's me. I don't know the exact case, but
8 you can ask me a question.

9 Q No question that this is your deposition,
10 right?

11 A This is my deposition, yeah.

12 Q Dr. Feingold, let me ask you if you
13 remember giving these answers to these

questions.

14 A Which page, please?

15 Q Page 81.

16 "Question: Do you think cigarette smoking
17 is an addictive disease?

18 "Answer: That is a very interesting topic,
19 one which I don't think that our late surgeon --
20 previous, I should say, shouldn't say late, but
21 previous Surgeon General contributed to the
22 scientific understanding of when he said that
23 cigarette smoking is addictive.

24 "Cigarette smoking is not exactly
25 addictive. The classical definition of

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1 addictive substance is still valid in that it is
2 a substance which is associated with the
3 development of tolerance. There are relatively
4 few such substances. They are all known to be
5 addictive in the social sense of the word:
6 Alcohol, cocaine, heroin, barbiturates are
7 examples.

8 "All of these substances have a distinct
9 tolerance feature. The alcoholic drinks
10 gradually more and more. The heroin addicts
11 usually use more and more heroin. Cigarette
12 smoke does not have that feature. A great
13 majority of people, people who smoke a fixed
14 number of cigarettes over a great many of years,
15 hence, do not have any tolerance component to

16 their behavior.
17 "Question: Do you think for the average
18 adult smoker who smoked many years that the
19 choice to continue smoking is less of a free
20 choice?
21 "Then there's an objection.
22 "The witness: It's an interesting
23 question. Again, I have spoken to the smoking
24 cessation clinic here for 10 years and I have
25 noticed the difference over the years: That is,
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1 ten years ago, eight years ago, the great
2 majority of people who decided that they would
3 stop smoking cigarettes did so quite easily with
4 relatively little discomfort. There are fewer
5 people who smoke today than 10 years ago. To
6 some extent the people who remain cigarette
7 smokers find it more difficult to stop smoking,
8 but that's not because of a physical cause.

9 "In most patients, in almost all people who
10 continue to smoke today, there is a very
11 important psychological reason why they do so
12 and why they decide to do so every day. It is
13 very much a matter of -- just like a matter of
14 losing weight. It's a matter of free choice,
15 but not all people can accomplish it. It is
16 very much a matter of free choice."

17 Q Did you give those answers to those
18 questions on May 13th, 1992, Dr. Feingold?

19 A I did.

20 Q And, Dr. Feingold, that's after you had
21 already been involved in learning about this for
22 probably a decade?

23 A That's correct.

24 Q And after you'd already begun your study

on

25 tobacco litigation matters, wasn't it?

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1 A On matters pertaining to tobacco, yes."
2 (The end of the video.)

3 MR. CRIST: I've considered walking you
4 through, then, what Dr. Feingold referred to as
5 a classical definition and more recent
6 definitions, but I think I'll just move forward
7 on to some other issues.

8 You'll remember perhaps on opening
9 statement that Mr. Wilner told you that

nicotine

10 was similar to heroin and alcohol in various
11 respects. He asserted that nicotine changed the
12 brain, perhaps irreversibly, making those
13 promises to you in setting the stage for
14 Dr. Feingold. I think that testimony speaks
15 pretty loudly to the fact that Mr. Wilner did
16 not keep those promises.

17 There was also additional evidence in this
18 case about nicotine receptors, nicotine receptor
19 UP regulation and Dr. Ciraulo addressed this.
20 You remember the pet scans that he showed

you,

21 the computerized slices which showed modest

or

22 no effect at all in the brain, but you'll also
23 remember that when he was talking about
24 receptors and talking about UP regulation of
25 receptors that he said the same thing happens
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1 with caffeine.

2 The caffeine interacts with the
3 admitting -- or demissing receptors in the brain
4 and that it, caffeine, causes UP regulation.
5 Caffeine, of course, is present not just in
6 coffee, but it's also in a lot of soft drinks.

7 Same kind if one were to pursue
8 Mr. Wilner's logic as then pursued by
9 Dr. Feingold talking about his lock and key
10 issue, that we're UP regulating on a daily basis
11 or the adising receptors in our children's
12 brains when we give them Cokes or we give

them

13 Diet Pepsi or we give them Sprite. Sprite
14 doesn't naturally have caffeine in it.

15 Does that mean using Mr. Wilner's and
16 Dr. Feingold's -- at least Dr. Feingold's new
17 view that people can't drink -- can't quit
18 drinking Coke, can't quit drinking Sprite, can't
19 quit drinking coffee. There may be discomfort
20 associated with it, but I submit people can,
21 just like people can quit smoking.

22 Indeed, you'll remember the evidence in
23 this case is that some 50 million Americans

have

24 quit smoking since 1964, half of everybody who
25 has ever smoked is a former smoker in this
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1 country. Can people quit? People can quit.

2 Now, I want to turn just very briefly to
3 Jean Connor and her medical condition.

There's

4 been a lot of evidence in this case, but there's
5 always been a missing piece of evidence. And
6 that is that we've never had available to us any
7 piece of lung tissue. We've had some scalene
8 node tissue that's been examined by
9 pathologists, we've never had lung tissue.

10 We've had evidence from virtually every
11 pathologist and I think every pathologist has
12 testified that a metastatic tumor may appear to
13 be different from a primary tumor. We've

heard

14 evidence, I think from every pathologist who's
15 testified, that the most common cancer in the
16 lung is a cancer which spread to the lung, not a
17 cancer which began in the lung.

18 I want to make absolutely clear what I've
19 said in opening statement and what Dr. Barsky
20 said when Dr. Barsky was on the stand, that

we

21 are not for one second suggesting that the
22 medical care that Jean Connor received was

less

23 than the absolute best. She was at least stage

24 3B. Her physicians were trying to make her
25 comfortable or were giving her palliative care,
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1 they could not cure a 3B, that's been the
2 evidence in this case.

3 They didn't need to know -- they didn't
4 have to have the kind of precision which I think
5 we need when we enter the legal environment.
6 That kind of precision could have been provided
7 if lung tissue had be obtained, not during life
8 would it serve any clinical purpose, but it
9 could have been obtained.

10 She brought this lawsuit, it was continued
11 after her death. Why didn't they provide you
12 with that evidence? Why did they not want to
13 provide you with that evidence? That evidence
14 could have made it crystal clear beyond dispute
15 but that the cancer started there or didn't
16 start there, that the cancer was one cell type
17 or was another cell type. There wouldn't have
18 been any dispute at that point. They created
19 that mystery and then that mystery has

persisted

20 in here.

21 We know from the radiology that there were
22 masses in both of Ms. Connor's breasts. Were
23 they malignant or not? We'll never know. An
24 autopsy wasn't conducted.

25 We do know from Dr. Roggli's testimony
that

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1 90 percent of all lung cancer in women begins
2 after age 46. The cancer in women at that age
3 -- the breast cancer in women is three times
4 more common when in that age than is lung
5 cancer. We know that Jean Connor's sister
6 developed breast cancer at almost precisely the
7 same age, 46 years old.

8 Why weren't those lesions examined? Why
9 wasn't there an autopsy? Why wasn't there an
10 effort perhaps to do a transbronchial biopsy to
11 obtain some of that tissue? We didn't create
12 that mystery, plaintiff's counsel did.

13 Now, I want to turn --

14 THE COURT: You're about to turn to
another
15 subject?

16 MR. CRIST: I am indeed.

17 THE COURT: I need to take a few minutes'
18 recess. It's 2:27, we'll be in recess until --
19 be ready to go at 25 till. Give me 10 minutes
20 from here, that'll be 2:37.

21 (Short recess.)

22 (The following proceedings were held in
23 open court out of the presence of the jury:)

24 THE COURT: One thing to another, I
added

25 10 minutes on to the time on the clock just to
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1 give you more time, but I've accounted for

2 approximately 10 minutes with interruptions.
3 MR. CRIST: Thank you, Your Honor.
4 THE COURT: Recall the jury.
5 (The following proceedings were held in
6 open court in the presence of the jury:)
7 THE BAILIFF: Be seated, please.
8 THE COURT: You may continue. Wait a
9 minute. All clear? Go ahead.
10 MR. CRIST: Thank you, Your Honor.
11 Ladies and gentlemen, just a couple more
12 things that I want to spend a few minutes
13 discussing with you. First is that you have
14 heard some attacks being made on the conduct
of
15 Reynolds. I want to talk about those for a few
16 minutes. Most of them are based on documents
17 written by a now retired Reynolds scientist by
18 the name of Dr. Claude Teague. Most of the
19 documents that plaintiffs have spent so much
20 time talking to you about that were written by
21 Dr. Teague had no addressees, had no copies,
had
22 no data, were styled proposals, were -- referred
23 to things as if, then and there is no evidence
24 that's been presented to you in this case apart
25 from idol speculation that any of those
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1 proposals which Dr. Teague wrote to himself
were
2 ever implemented.
3 Indeed, you may remember the testimony of
4 Dr. Pollay when we were asking him about one
of
5 those documents, which was marked as
Plaintiff's
6 Exhibit 50, which Mr. Wilner referred to this
7 morning. It's labeled a draft, there are no
8 addressees, no evidence anybody's ever received
9 it, there are no documents convergent with it.
10 Remember I -- Dr. Pollay dodged that word,
even
11 though he used it in deposition. No evidence,
12 Dr. Pollay agreed, that it ever became part of
13 Reynolds' policy and no evidence, Dr. Pollay
14 agreed, that was ever acted upon, but we have
15 seen witness after witness after witness ask
16 about that document.
17 We have heard Mr. Motley and Mr. Wilner
18 time after time after time treat that document
19 as if it were gospel within R. J. Reynolds
20 Tobacco Company, even though it never went
to
21 anybody as far as the evidence shows. There
are
22 no addressees, no copies, no evidence was ever
23 acted upon, no evidence had ever become a
part
24 of anybody's policy, no evidence, indeed, that
25 it even became a part of Dr. Teague's policy
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1 since it was all framed in the terms of if.

2 And they have taken other documents out of
3 context as well, out of historical context and
4 out of factual context. You've seen a document
5 -- another document by Dr. Teague which he
6 proposed an investigation of an altered tar and
7 nicotine ratio. Somehow reduced the tar but
8 keeps the nicotine steady which would -- at a
9 level, which would -- which would adjust the
10 target and the ratio, but the fact of the matter
11 is, as you heard in this case, that's precisely
12 one of the recommendations that was made in

the

13 1981 Surgeon General's report.

14 Remember from this case, Dr. Doll on
15 videotape testified that that was a responsible
16 thing to investigate. If it hadn't been
17 proposed, if it hadn't been investigated, we
18 would probably now be sitting here being
19 criticized because we didn't consider it,
20 because we didn't investigate it.

21 You've also heard allegations being made
22 that things like Dr. Teague's think pieces
23 should have been published, that Dr.

Rodgman's

24 memos should have been published even

though

25 Dr. Feingold, and I think maybe Dr. Roggli on
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1 one occasion took fault and said that there were
2 passages and they were false. If we had
3 published those things with those false
4 passages, we would be in here right now
5 explaining to you why we published what they
6 alleged to be false things or we would be in
7 here because they would have taken some other
8 tiny fraction of documents from R. J. Reynolds
9 and said, You should have published these, too.

10 The only escape from that would be to
11 publish everything, but no company does that,
12 corporations are not academia. In universities
13 publisher parish may be the lifeblood, that's
14 not true in corporations; competition is the
15 lifeblood. The free exchange of idea is to try
16 to improve your competitive position is the
17 lifeblood of corporations.

18 As you see those things in deliberations,
19 ask yourself, is this really any different than
20 we would expect to see of any corporation? Is
21 this anything with a corporation who's had
22 thousands of employees, tens of thousands of
23 employees over the course of the past 40 or 50
24 years? Is it unusual to find things that
25 somebody somewhere can't characterize in a

bad

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1 way, but they wouldn't pick out of the tens of
2 thousands or hundreds of thousands of

documents

3 provided to them and said, Ah-hah, look here,
4 and then try to use that document, that isolated
5 document created over 30 or 40 years to try to

6 paint the corporation and its employees over the
7 course of the past 40 or 50 years by saying,
8 This think piece by Dr. Teague characterizes
the
9 entire corporation for its entire history. That
10 kind of conclusion, which is the one they're
11 seeking to have you draw, is entirely
12 unjustified with respect to any company and it's
13 entirely unjustified with respect to my client.
14 Now, I told you in opening statement that I
15 wasn't going to come in here and tell you that
16 and I'm not going to come in here and tell you
17 now that no mistakes were ever made by R. J.
18 Reynolds Tobacco Company because it
wouldn't be
19 true and you wouldn't believe me.
20 And one of the things that has concerned
21 me, quite honestly, was this document which
was
22 referred to in the course of trial, a paper of
23 1962 by Dr. Rodgman. And you'll remember
in
24 that document that Dr. Rodgman said that
some of
25 the research remained unpublished. I don't
know

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1 why, plaintiffs counsel don't know why and we
2 may never have an answer to that. But what I
3 also know is that we need to contextualize this,
4 that we need -- need to be able to put this in
5 fair perspective.
6 And so I wanted to invite your attention
7 when you look at this document to page six. And
8 you'll see there at the bottom -- I can't read
9 it, chemical data. And it says, Cigarette smoke
10 contains 14 polycyclic hydrocarbons, then it's
11 got a number 27 with an asterisk. At the
bottom
12 it says, This author, which is Dr. Davies you'll
13 see from the footnotes at the end of the
14 document, this author, Dr. Davies, discusses
all
15 the polycyclic hydrocarbons except for
16 coalveric.
17 And if you'll look at page 11 of this
18 document, you will see that Dr. Rodgman says
in
19 here that the tobacco industry was funding
20 through CTR, 36 separate scientists were
looking
21 at the chemistry of tobacco and its smoke. It
22 was not a situation in which Reynolds
controlled
23 all of the information available in the
24 scientific community, because Dr. Davies',
25 footnote 27, himself already published on
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1 everything except for planetary. In addition to
2 that, 36 scientists were being funded through
3 what was then known as the Tobacco Research

4 Committee, conducted a research on the
chemistry
5 of tobacco and its smoke.
6 And this document fairly read reflects
7 Dr. Rodgman's pride in the scientific quality of
8 the R. J. Reynolds Tobacco Company research
9 department. And it confirms, although not said
10 at this point in time, but it confirmed that
11 R. J. Reynolds Tobacco Company had made
more
12 contributions to the knowledge of smoke
13 chemistry than everybody else put together.
And
14 that's true today. R. J. Reynolds Tobacco
15 Company has published about half -- or more
than
16 half of all the known constituents of smoke.
17 Everybody else in the world combined counts
for
18 that other half. But in addition to this, even
19 though some of this wasn't published at the
time
20 of this memo, it had already been published by
21 others and we were funding people who were
22 continuing to work on it.
23 Now, there's one more fact that's important
24 here that you've heard in evidence in this
25 case. You will remember that I showed
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1 Dr. Townsend an article dated August of 1963
2 that was published in a journal -- I don't
3 remember the name of it, I don't have it written
4 down, but it was about two or seven TNF. You
5 may remember Mr. Motley tried to help me
spell
6 trinitrofluoreneol, which is what TNF stands
7 for.
8 August 1963, just a few months after
9 Dr. Rodgman's memo, this article was
published.
10 And as Dr. Townsend told you, that article in
11 August of 1963 discussed PaHs, including
12 benzo(a)pyrene, BaP, benzanthrane
(phonetic),
13 methylcholanthrene and dibenzanthracene,
among
14 others. So within a matter of months R. J.
15 Reynolds Tobacco Company was, in fact,
published
16 on these.
17 That's not the end of the story because
18 you'll remember when Dr. Townsend testified --
19 oh, here it is, here's the article, published in
20 Analytical Chemistry. Dr. Townsend testified,
21 he told you that he made a presentation and
22 aided him as part of the Canadian expert
23 Committee on cigarette modification and this
was
24 a part of that presentation. And it includes
25 discussions of BaP, phenol, NNN, NAT, NNK.
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1 You remember plaintiff's introduced into
2 evidence as Plaintiff's Exhibit 58 the science
3 summary on the Premier cigarette which
includes
4 discussions of the levels and tobacco burning
5 cigarettes versus the levels in Premier of such
6 thing as BaP and PaH. Compares the levels of
7 various classes of compounds, including PaHs
and
8 nitrosamines. And that information is also
9 detailed in this 1988 monograph that described
10 the Premier cigarette, which has been marked
--
11 a xeroxed copy of which has been marked into
12 evidence.
13 Pages 95 and 96, for example, long tables
14 on some of the constituents of smoke, including
15 such things as benzo(a)pyrene. I don't know
why
16 it wasn't published in 1962, but what I do
know,
17 it has been published in 1963 and has been
18 published repeatedly ever since. What I also
19 know and what the evidence in this case
showed
20 you is that more than 40,000 articles have
been
21 published in the area of smoking and health.
22 What I do know is that the government has
been
23 actively involved for decades.
24 You have heard that Drs. Wynder, and more
25 recently his colleague for a long time,
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1 Dr. Detrick Hoffman, have been involved in this
2 research. And an enormous amount which has
been
3 done in this. In the final analysis, one really
4 has to ask, what impact did it have?
5 Benzo(a)pyrene was known in 1954, you saw
that
6 in a Rodgman 1959 memo published by the
Wagner,
7 Lindsey and Cook, I believe. A lot more had
8 been published, Dr. Lewis Heishman, who
served
9 on the Surgeon General's advisory committee,
did
10 work this this area the evidence has shown.
11 The final analysis is what difference did
12 it make, certainly made no difference on Jean
13 Connor. Finally, I submit it made no
difference
14 in terms of the scientific community itself,
15 given its overwhelming number of articles that
16 have been published out there and given
17 Reynolds' contributions to smoke composition,
18 generally both before and after.
19 Now, there have also been other suggestions
20 but I don't -- other issues that have come up
21 that I don't want to spend a lot of time on.
22 I'm not going to talk to you again about the

23 Flintstones. You will have back there as
24 Defendant's Exhibits 36, 37, and 38,
25 Jacksonville Times-Union, the Jacksonville
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1 Journal, New York Times, all of which describe
2 this as being an adult cartoon comedy. If you
3 remember, it was co-sponsored by Alka-Seltzer,
4 featuring Speedy Alka-Seltzer. And even
5 Dr. Pollay admitted, nobody claims that
6 Alka-Seltzer was trying to attract kids.

7 You'll also remember that there is evidence
8 in this case that there were cartoons used for
9 other adult products. Dr. Pollay told you about
10 his pink flamingo and said that's somehow a
11 variant of the Pink Panther in Canada. I'm not
12 going to dwell on that.

13 I do want to spend a minute talking about
14 advertising. The advertising that was
15 introduced in this case was introduced for the
16 limited purpose of dealing with consumer
17 expectations. Did it affect consumer
18 expectations? Did it affect this widespread
19 awareness we talked about a few minutes ago?
20 And for no other purpose, advertising -- there's
21 no evidence in this case that advertising had
22 anything to do with Jean Connor's decisions.
23 She said she kind of recognized two, but it
24 didn't affect her decisions on smoking, that's
25 not why that evidence is in there.

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1 And you will see when you look at those ads
2 that most of those ads are 40 and 50 years old,
3 some of them more recent than that. Many of
4 them predate Jean Connor's birth. I saw one of
5 them this morning was in the 1920s, predated

her

6 birth by 24, 25 years.

7 Some of those ads when looked at from
8 today's perspective and without being able to go
9 back to what was happening in 1940s or 1950s
10 looked just really incongruous. I can't move us
11 back to the 1940s or 1950s, but what I do know
12 is that with respect to some of those ads that
13 were started that the plaintiffs wants to leave
14 you with the impression that those ads

somehow

15 served to undermine consumer awareness, that
16 they somehow served to reassure people that
17 that's not the evidence in this case.

18 Their own witness, Dr. Pollay, took the
19 stand and he told you that those ads kept health
20 concerns, to use his word, salient. And I
21 always get a little uncomfortable when
22 Dr. Pollay's defining terms, but salient means
23 prominent. And those ads, in his testimony,
24 kept those concerns prominent. In other

words,

25 his testimony confirms not only what we

showed

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1 you about consumer expectations but that that
2 was being built up even more by that
3 advertising.
4 Now, one final quick point here and I'm
5 going to move to another issue. And that is
6 you've also heard repeatedly, endlessly about
7 disclosure or nondisclosure of tar nicotine
8 levels, disclosure, nondisclosure of additives,
9 disclosure, nondisclosure of ingredients. So I
10 wanted to just come back to touch a second on
11 what the evidence in this case was.
12 The evidence in this case was that from
13 1955 to 1965 or so, the Federal Trade
Commission
14 prohibited the disclosure of tar and nicotine
15 levels. You remember Dr. Feingold said that
16 wasn't true, that Dr. Pollay confirmed that that
17 was true as did Dr. Townsend. Dr. Feingold
was
18 simply wrong. It was prohibited, could not
19 disclose it. About 1965, the evidence showed
20 the FTC flip-flopped and allowed it to be
21 disclosed and then mandated it a couple of
years
22 later.
23 When we're accused of not disclosing tar
24 and nicotine levels at the time that Jean
Connor
25 began smoking in about 1961, the fact of the
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1 matter is, as the evidence in this case shows,
2 we couldn't, we couldn't, it was prohibited.
3 There was also discussion in the -- in the
4 course of this case about why we didn't disclose
5 constituents of smoke. And you may remember,
if
6 I can find it quickly, I will show you that
7 Dr. Feingold admitted, as he had to, that we
8 were prohibited from making or from disclosing
9 such things as benzo(a)pyrene content. I don't
10 find the transcript reference right away, so
11 I'll just move ahead.
12 With respect to additives, you'll remember
13 in opening statement that Mr. Motley got up
and
14 he waved in front of you a package of Snack
15 Wells, said, Look at the ingredient labeling on
16 the back. I brought my own package of Snack
17 Wells, which I'll be happy to donate to the
18 court or to jury deliberations or for whatever
19 purpose, and on the back, among other things,
it
20 says, Artificial flavor. Now, what is that?
21 What is that? Pick up a can of Coke, natural
22 and artificial flavors. What are those? Have
23 any of you ever seen the formula for Coke, the
24 formula for Pepsi, the formula for beer, the
25 formula for Jim Beam whiskey?
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1 Corporations have, as Dr. Townsend told
2 you, proprietary information. Trade secrets is

3 the way I refer to it. They don't want their
4 competitors to know about it because they think
5 that it gives them the advantage. There's been
6 no evidence in this case that additives don't
7 fall into the kind of a category.

8 Now, I want to turn quickly to one other
9 issue and that has to do with allegations that
10 have surfaced from time to time in the course of
11 this case about R. J. Reynolds' position on
12 smoking and health, particularly smoke and

lung
13 cancer. Mr. Motley mischaracterized it to you,
14 what he has said today.

15 My client's position is not cigarette
16 smoking does not cause lung cancer or other
17 diseases which has been associated. My client's
18 position, if you wanted to try to put it into --
19 into a sound bike, would be that cigarette
20 smoking may be a cause of those diseases.
21 Smoking is a risk factor of those diseases.

22 I told you on opening statement that you
23 would be hearing in the course of this trial
24 about four lines of evidence in the areas
25 epidemiology, toxicology, animal and

mechanism.

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1 And I told you the evidence would show

cigarette

2 smoking was associated, physically associated
3 with completion of many forms of lung cancer,
4 certainly other diseases, some stronger, some
5 less.

6 Toxicology, the mouse skin painting was
7 positive, you paint enough stains on the backs
8 they will be positive. The animal inhalation
9 would be negative. I told you in cigarette
10 smoke there are constituents that are

considered

11 to be carcinogenic, at least in some level, some
12 dose, some tissues, in some animals.

13 There are also anticarcinogens from
14 cigarette smoke, but even as we speak or in this
15 courtroom today, nobody's going to walk in here
16 and tell you, I know what is in cigarette smoke
17 that causes cancer. The science can't do it and
18 that's a real frustration or has been a real
19 frustration. As you heard from Dr. Townsend,
20 how do we make a cigarette which is going to
21 satisfy our critics? What do we take out?
22 First BaP, then there's not enough BaP, it

moves

23 to mean phenol, phenol then includes the
24 anticarcinogenic smoke, lung in 210

(phonetic),

25 not enough lung in 210, moves to scillas state,
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1 strung out in the oral cavity, it then moves to
2 something else, like nitrosamines, which may.
3 And they seemed to investigate those frustration
4 after frustration after frustration and then
5 science moved on and kept moving on and the

6 mechanism is how.
7 And that's what the evidence is. R. J.
8 Reynolds Tobacco Company has been aware of
all
9 that evidence as it's emerged, so has the public
10 health community, so has the American public,
at
11 least in a general way.
12 The question is when you look at all this
13 evidence, what does it mean? What happened
was
14 in 1964 the advisory committee said, I cannot
15 prove it in an absolute sense, so we are going
16 to apply judgment and our judgment is
cigarette
17 smoking causes cancer and that judgment may
be
18 right, is my client's position, but there are
19 still missing pieces of evidence.
20 Now, one of those missing pieces of
21 evidence, one of them's inhalation. What's been
22 the evidence in this case on inhalation?
23 THE COURT: Mr. Crist?
24 MR. CRIST: Yes, sir.
25 THE COURT: It's now been two hours and

two

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1 minutes.
2 MR. CRIST: Thank you, Your Honor.
3 That's what the evidence shows. I've got
4 to tell you, Dr. Roggli disagreed with these
5 people, but that's what the evidence is, it's
6 been negative. That's what the -- in '64, in
7 '82 and even today. Dr. Sir Richard Doll, you
8 may remember, testified that he had written a
9 draft article, the draft article included that
10 language. This is Dr. Feingold.
11 In addition to that, still uncertainty here
12 with respect to the chemistry. And then finally
13 on the mechanism. How? Let me tell you what
14 the evidence is. On opening statement
15 Mr. Wilner admitted to you, quote, I'm the first
16 one to say nobody knows all the answers about
17 cancer, we know a little bit about what's called
18 the mechanism.
19 Dr. Sir Richard Doll, the mechanism of
20 cancer is, quote, not fully described.
21 Dr. Roggli, quote, there are many, many
22 steps in a molecular basis of carcinogenesis of
23 cancer that we do not really understand.
24 And that's where we are today. And from
25 time to time my client has expressed that view
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1 publicly and has been condemned in this
2 courtroom and elsewhere for having done so.
But
3 in addition to the fact that my client had
4 expressed that view from time to time publicly,
5 or perhaps through the Tobacco Institute, my
6 client has also, since 1966, carried on every
7 package of cigarettes since about 1971 in every

8 advertisement, the judgment of the Surgeon
9 General that cigarette smoking causes these
10 diseases.
11 And when you see documents like Plaintiff's
12 Exhibit 47 in evidence in this case, you will
13 see them almost always being framed this way.
14 In fact, many of you probably believe there is
15 nothing to debate. Over the years you have
16 heard so many negative reports about smoking
and
17 health and so little to challenge these reports
18 that you may assume the case against smoking
is
19 closed.
20 There is an expressed recognition in there
21 of two things. One is that people almost
22 universally believe that the case is closed.
23 And, secondly, that nobody has ever heard
what
24 Reynolds directly or perhaps the Tobacco
25 Institute have had to say.
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1 Now, I want to turn to essentially the
2 final point that I want to talk to you about
3 because Mr. Wilner said it here this morning
and
4 he said it on opening statement as well. And
5 when I came to you and I said, Hold him to his
6 promises, this is one of the things that I had
7 in mind.
8 He said -- he told you on opening
9 statement, There was never any adequate
testing
10 of Salem or Winston cigarettes, which Ms.
Connor
11 smoked. There was no evidence that Reynolds
12 cared about his customers in any of their
13 statements or documents.
14 The evidence is -- those are the two -- and
15 he came back in -- in closing argument and he
16 said something very similar to that. Where is
17 the evidence that Reynolds cared about
anybody
18 other than itself? I submit that the evidence
19 is overwhelming that Mr. Wilner failed to keep
20 his promise to you because, in fact, as you have
21 seen and heard here in this courtroom,
Reynolds
22 has done an enormous amount in the area of
23 cigarette design. But with respect to this
24 whole cigarette design issue, which I told you
25 we would get to eventually, there has been no
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1 evidence, no evidence in this case of any
2 feasible design modification that Reynolds
3 failed to adopt. There has been no evidence
4 that Jean Connor would have switched to this
5 hypothetical cigarette with this hypothetical
6 design modifications. There's been no evidence
7 that she continued to smoke it. There's been no
8 evidence that this hypothetical alternative

9 cigarette would have eliminated the danger to
10 her. And, in fact, there's been no evidence in
11 this case there's ever been a sustained
12 scientific census on how one would go about
13 trying to produce this hypothetical cigarette.
14 With respect to this issue, I'm going to
15 talk about Dr. Townsend in a second, but I
want
16 to assure you that the evidence in this case is
17 not limited to Dr. Townsend. Even Mr.
Wilner's
18 multi-purpose witness, Dr. Feingold conceded,
19 when pressed, that Reynolds has done an
enormous
20 amount of work in this case.
21 On April 16th on cross examination he told
22 you this under oath, referring to -- this is the
23 Rodgman 1959 memo.
24 "And they did an enormous amount of work,
25 didn't they?
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1 "Answer: Yes, they did. They did about
2 120 experiments, they say, at this time."
3 He goes on to talk about -- to admit that
4 Reynolds began using reconstituted -- pioneered
5 and reconstituted tobacco sheet, which had
lower
6 total sals (phonetic) delivery in 1954. And
7 then admits that Reynolds pioneered the use of
8 expanded tobacco, which also had lower --
9 MR. WILNER: Your Honor, I don't think
this
10 is in evidence, I think this is the deposition
11 he's reading from.
12 MR. CRIST: This is the trial transcript.
13 MR. WILNER: Oh, I'm sorry, Your Honor.
14 MR. CRIST: And you'll recall that Dr. Sir
15 Richard Doll testified by videotape that there
16 had been a tremendous reduction in the tar
17 levels that cigarettes made in the United
18 States.
19 You'll recall when Dr. Townsend was on the
20 stand and Mr. Motley was cross examining
him,
21 that Mr. Motley tried to mock the significance
22 of those contributions by talking about the fact
23 that the lung cancer instance had increased, of
24 course, the age of the population increased as
25 well, but Mr. Motley was mocking Dr.

Townsend,

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1 saying there was really no contribution. But
2 the fact of the matter is that his own witness,
3 Dr. Sir Richard Doll, told you that he believed,
4 he, Dr. Doll, believed that it was proven beyond
5 a reasonable doubt that low tar cigarettes
6 reduced the risk, beyond a reasonable doubt. So
7 despite Mr. Motley's mocking of Dr. Townsend,
8 Dr. Sir Richard Doll himself said beyond a
9 reasonable doubt that they -- the lower tar
10 cigarettes reduce risks.

11 The fact of the matter is, as you see from
12 all the evidence that's been presented to you in
13 this case, R. J. Reynolds Tobacco Company
and
14 its domestic competitors have revolutionized
15 cigarette design. Smoking and health issues
16 have not been confined to the United States.
17 Dr. Doll talked about his research in Britian.
18 The major advances, though, have come out of
19 this country, out of these companies, and
20 particularly out of R. J. Reynolds Tobacco
21 Company, good, old American ingenuity at its
22 best.
23 You heard Dr. Townsend testify about some
24 of those efforts. He talked to you about
25 techniques to explore to reduce

benzo(a)pyrene,

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1 tobacco additives, different filter materials,
2 different filter additives, different cigarette
3 papers, tobacco extraction. He talked to you
4 about the problems that were encountered and

in

5 attempting to accomplish selective reduction,
6 information which you saw also coming from --
7 from Dr. Wynder and from others in the course

of

8 this case about how technically difficult this
9 kind of a process was.

10 You saw evidence in this case of an
11 enormous amount of work that R. J. Reynolds
12 Tobacco Company had done working with

tobacco

13 substitutes for stems, included crazy things
14 like Hudson, that they tried to see if it would
15 work, more than 100, I think there were 105

that

16 were listed on here.

17 And then you saw and heard testimony about
18 Reynolds -- about the advantages of general
19 reduction, particularly as compared to selective
20 reduction and then about the enormous strides
21 which had been made entirely in reduction

across

22 the board, running from about 38 milligrams

of

23 tar and about 3.2 milligrams of nicotine, all
24 the way down to the sales weighted average

today

25 -- well, I'm sorry, this cuts off at about 1966
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1 of -- this talks about 20 milligrams of tar --
2 looks like this is 20 milligrams of tar to about
3 1.1 milligrams of nicotine. The sales weighted
4 average today is even below that. I think it's
5 now down to about 12 -- the sales weighted
6 average base, it's now down to about 12
7 milligrams of tar, about .9 milligrams of
8 nicotine. I think that was Dr. Townsend's
9 testimony on this point.

10 The same -- the technology that went into

11 being able to accomplish these reductions were
12 also detailed to you by Dr. Townsend. Use of
13 reconstituted tobacco sheet, faster burning
14 paper, longer filter, porous paper, improved
15 filters, expanded tobacco, air resolution and so
16 forth.
17 Major design innovations, who would have
18 thought if you take a leaf, it expanded like a
19 can of popcorn. Reynolds developed that
20 technology and that was pioneered in its use in
21 cigarette design. But it didn't stop there.
22 Dr. Townsend explained to you there came a
23 point when the industry sales weighted average
24 basically plateaued, consumer acceptance was
not
25 going any lower, despite the fact that there
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1 were products which were far lower than that
2 which were available in the marketplace.
3 Reynolds tried a new strategy. The first
4 was Eclipse -- or the first was Premier, a
5 cigarette which heated and didn't -- but didn't
6 burn tobacco. And with respect to this product,
7 they published a 740-page manuscript, detailed
8 the product in its most intimate detail and
9 comparing it with typically, as I recall, the
10 reference cigarettes, which are used for
11 comparison purposes.
12 And you had the opportunity to dissect
13 those Premier. And you heard about how and
14 you've seen some of the graphs here recently
15 about reductions in some of the smoke
16 chemistry. You can read in here, if you want,
17 about the reductions in some of the toxicology
18 testing that was done, including some of the
19 Aims tests and other invetro tests where you get
20 bacteria and stem like.
21 You've heard about how it's test marketed
22 and how it failed, just by massive investigative
23 scientific effort and how it was, therefore,
24 withdrawn. Reynolds didn't stop there.
25 It then developed Eclipse, which is now
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1 being test marketed in Chattanooga, and which
is
2 also being test marketed in Germany, and I
3 believe Dr. Townsend said in Sweden. Again, a
4 cigarette which by and large heats but does not
5 burn tobacco.
6 And you also heard Dr. Townsend describe to
7 you EW, a new strategy with tobacco burning
8 cigarettes, to try to reduce classes of
9 compounds, kind of a selective reduction on a
10 class of compound basis which is now being
test
11 marketed as well.
12 This is a record of an accomplishment with
13 respect to cigarette design that is unmatched in
14 the world. Mr. Wilner says it's not enough. He
15 says, Something more should have been done,
but

16 he can't tell you what and he can't tell you how
17 and he can't tell you how if what he wants done
18 and how he wants it done would have made a
bit
19 of difference.
20 Now, one of the points that I wanted to
21 also note in this connection is the fact that,
22 as I noted before, the smoke and health issues
23 have been of concern throughout the world,
have
24 been specifically limited this country, but
25 they're also, with respect to cigarette design
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1 issues, been a concern throughout the world, but
2 these developments have come out of Reynolds
and
3 its competitors in this country.
4 The government was also involved, as I told
5 you, for a 10-year period. 1968 to 1978
6 roughly. No major design advances came out of
7 the National Cancer Institute Program during
8 that -- during that period of time. 1978, the
9 government simply shut it down, just banded
the
10 entire program, employees were let go or
farmed
11 off to go into other things. And why?
12 Dr. Townsend explained, pure politics.
13 This, the evidence has showed, I believe,
14 to be a remarkable record of attempting to
15 respond to consumer demand and to the
criticisms
16 of the scientific community. It is a remarkable
17 record by a large number of very remarkable
18 scientists employed by R. J. Reynolds Tobacco
19 Company over the years.
20 Now, there are perhaps other issues that
21 have been raised during the course of this trial
22 and that perhaps were raised in the course of
23 closing argument that I didn't address. I don't
24 want to leave you with the impression that by
25 not responding to something you think that I
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1 should respond to that I'm agreeing with what
2 Mr. Motley or Mr. Wilner may have said, may
have
3 inferred or may have raised by way of innuendo.
4 Frankly, I'm tired, it's been hard work,
5 it's been challenging. I've had to be selective
6 in deciding what were the most important
things
7 to talk to you about and not -- perhaps not
8 others that I should have, so don't take my
9 nonresponse as being an agreement because it,
10 frankly, may simply be tiredness.
11 But I don't want to leave you also with the
12 impression that -- that by not responding that
13 I'm not appreciative for the attention which
14 you've given to me, the attention which you've
15 given to the witnesses we've presented or to the
16 other witnesses during the course of this case

17 because I am deeply appreciative. I know it's
18 hard work. I know it drives me crazy to sit
19 over there and not be able to speak for extended
20 periods of time. You may have remembered

when

21 there were times when I didn't have
22 responsibility for a witness and I was still
23 jumping up wanting to raise an objection.
24 You've been very, very patient with us.
25 I'm sorry we haven't gotten to know each other
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1 better. I appreciate the sacrifices which
2 you've made. And I know the child care and
3 other responsibilities for some of you, it's
4 been difficult.

5 My client is also deeply appreciative. The
6 fact of the matter is, as was pointed out to you
7 I think by Mr. Motley before, is that our
8 judicial system wouldn't work without you.
9 Thank you.

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